LIEW GEOK LAN (F)

v.

JOHN LOH

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[ORIGINATING SUMMONS NO. KG. 189 OF 1987]
5 MAY 1993

LAND LAW: Application for order for sale of charged land - Defendant not attending hearing - Whether application should be granted - Principles applicable.

The plaintiff lent the defendant some money in consideration of which the defendant executed a charge over his land in favour of the plaintiff. Upon the defendant's default the plaintiff applied for an order for sale on the charged land. The defendant was served with the notice of hearing but failed to turn up on the date appointed for the hearing of the matter.

Held:

[1] A plaintiff is required to prove her claim so far as the burden of proof lies on her. The proof will be limited to the allegations in the claim, in this case as contained in the originating summons and the supporting affidavits. A plaintiff having proved her case is entitled to such relief as she claims and such other relief as is consistent therewith.

[2] The plaintiff had satisfactorily proved her case, considering the evidence given and the exhibits tendered and admitted, and was entitled to the relief sought.

[Plaintiff's application allowed with costs].

Cases referred to:

Hup San Timber Trading Co. Sdn. Bhd. v. Tan Ah Lan [1979] 1 MLJ 238 FC ***(refd)***
Redditch Benefit Building Society v. Roberts [1940] 1 All ER 342 ***(refd)***
Barker v. Furlong [1891] 2 Ch. 172 at page 179 ***(foll)***
Stone v. Smith [1887] 35 Ch. D 188 ***(foll)***
Kingdom v. Kirk [1888] 37 Ch D 141 ***(foll)***

Legislation referred to:

Land Code (Cap. 81), ss. 148(2), 150(1), (2), 151
Rules of the High Court 1980, O. 35 r. 1

For the plaintiff - John Shek; M/s. John Shek & Co.

JUDGMENT

Richard Malanjum JC:

This action was commenced on 20 June 1987 as an application for an order for sale of a charged land by the plaintiff. In view of the various allegations contained in the affidavit in opposition of the defendant the proceeding was ordered on 7 November 1988 to continue as if it had begun by writ of summons with the affidavits filed to stand as pleadings. The parties were also given the liberty to apply for further particulars where necessary.

Service of Notices of Hearing:

On 28 November 1992 this Court fixed the hearing of this case to be on 8 April 1993 at 9.00 a.m. On the day of hearing this Court was informed that the notice of hearing was not served on the defendant as attempts to locate him by the High Court process server at the given address failed. From the endorsements of the process server I note that an attempt was also made to locate him at his office on 7 April 1993 but the process server was told that the defendant was not in the office. On the same day the process server went to the house of the defendant where he saw the defendant's motorcycle but no one opened the gate. The matter was therefore adjourned to the afternoon to enable Counsel for the plaintiff to locate the defendant at his place of work. When the Court resumed learned Counsel for the plaintiff informed the Court that his staff went to the office of the defendant but was told that the defendant was on sick leave. Whereupon an attempt was made to locate the defendant at his house but no one was at home, Accordingly the hearing was adjourned to 12 April 1993 at 2.30 p.m. on the application of learned Counsel for the plaintiff. A fresh notice of hearing was issued accordingly and learned Counsel for the plaintiff agreed to effect the service. I had earlier on granted the request of learned Counsel for the plaintiff that his office be given a letter so as to enable him to seek assistance from the Director of the Department of Royal Malaysia Customs and Excise, Kuching where the defendant works. I granted the request of the learned Counsel for the plaintiff after considering that the defendant was indeed a difficult person to serve the notice of hearing on

after reading the endorsements of the Court process server on the notice of hearing as well as the previous hearings of this case as recorded in the Court's file. I note that the defendant was initially represented by Counsel but the matter was adjourned four times. At the fifth hearing the defendant was no longer represented by Counsel and he was also absent. The hearing was again adjourned to 7 November 1988 by which time the presiding Judge at that time made the order as abovementioned.

When the hearing of the summons for directions was heard on 1 December 1988 the defendant was absent as he was unserved. For the next three hearings of the summons for directions, namely, on 14 January 1989, 4 March 1989 and 15 April 1989 they ended up in adjournments as the defendant was unserved. And on 10 June 1985 the hearing of the summons for directions came up with the defendant having been served but he was absent as well. The hearing proceeded with the relevant orders made. Thereafter nothing was done on this case until it was called for mention on 28 November 1992.

At the hearing on 12 April 1993 learned Counsel for the plaintiff informed the Court that the defendant had been duly served with the notice of hearing on 10 April 1993 at 11.30 a.m. and the defendant duly signed on a copy of the letter of the learned Senior Assistant Registrar which was addressed to the Director of the Royal Malaysia Customs and Excise, Kuching as well as on the notice of hearing itself. The defendant was absent and no one came to Court to inform of the reason for his absence and there was no letter of any sort from the defendant to indicate the reason for his absence. I would have considered any explanation of the defendant orally or in writing but there was none even at the time of writing this judgment. [See: *Hup San Timber Trading Co. Sdn. Bhd. v. Tan Ah Lan* [1979] 1 MLJ 238 FC and *Redditch Benefit Building Society v. Roberts* [1940] 1 All ER 342].

The Law:

Having satisfied myself that the defendant has been duly informed of the hearing of this case and he not appearing without any explanation I proceeded to hear the plaintiff's case pursuant to O. 35 r. 1 of the Rules of High Court 1980.

In considering this particular case in view of the absence of the defendant I bear in mind the following principles of law, namely, that the plaintiff is required to prove her claim so far as the burden of proof lies on her. The proof will be limited to the allegations in the claim, in this case as contained in the originating summons and the supporting affidavits. [See: *Barker v. Furlong* [1891] 2 Ch. 172 at page 179].

Further, the plaintiff having proved her case is entitled to such relief as she claims and such other relief as is consistent therewith . [See: *Stone v. Smith* [1887] 35 Ch. D 188; and *Kingdom v. Kirk* [1888] 37 Ch D 141].

The Plaintiff's Claim:

The claim of the plaintiff is for an order for sale of the charged land described as Lot 105 Section 57 Kuching Town Land District situated at Ellis Road, Kuching, Sarawak containing an area of 167.5 square metres, more or less together with the buildings and appurtenan-ces thereon (hereinafter called "the Charged Land") pursuant to s. 148(2) of the Land Code (Cap. 81). It is the evidence of the plaintiff that the defendant was her friend even before November 1985. The plaintiff further testified that at the beginning of November, 1985 the defendant came to see her wanting to borrow RM60,000 from her. At first she refused but subsequently around the 18 or 19 November 1985 she agreed resulting in the execution of Ex.P2 (the Memorandum of Charge dated 18 November 1985 and registered as Instrument No. L.14010/1985). The plaintiff also said that she paid the money advanced to Mr. Lo Ming Lominus; (PW2).

At this juncture it is to be noted that the defendant in his defence, by way of his affidavit in opposition affirmed on 26 October 1987 and filed, did not deny that he had borrowed money from the plaintiff but contended that he only borrowed RM45,000 and that Ex.P2 was not the document he executed. In short the defendant denied the authenticity of Ex.P2. But as the defendant did not appear this Court is therefore only concerned with what is required to be proven by the plaintiff. Besides the evidence of the plaintiff, Mr. Lo Ming Lominus (PW2) also gave evidence that he prepared Ex.P2 and he attested the signatures of the defendant and the plaintiff. He

further said that the money advanced was paid to the defendant through his legal firm and he tendered a copy of the payment voucher (Ex.P3). Accordingly I find that the plaintiff has proved that she had advanced the sum of RM60,000 to the defendant in or around 18 November 1985.

The next question is whether or not the defendant has repaid the sum advanced. The plaintiff testified that she has not received any money from the defendant as repayment for the sum advanced. The plaintiff was also shown a document in relation to the alleged payment of RM45,000 but she denied the signature found therein was hers and said that she has never seen the document before. I have no reason to disbelieve the plaintiff. As such I find that the money advanced by the plaintiff to the defendant pursuant to Ex.P2 is still due and owing.

Conclusion and Orders:

Having considered the evidence given in this case and the exhibits tendered and admitted I am satisfied that the plaintiff has proved her case and is therefore entitled to the relief sought. I therefore hereby grant:

(i) the order for sale of the Charged Land by way of public auction and subject to ss. 150(1) and (2) and 151 of the Land Code (Cap. 81) to satisfy the sum of RM60,000 being the sum due and owing under the Memorandum of Charged registered as Instrument No. L14010/1985 at the Kuching Land Registry Office on 2 December 1985;
(ii) that the proceeds of sale shall be deposited with the Court on account of this action until further order;
(iii) that there shall be interest on the sum outstanding at the rate of 8% per annum from the date of this judgment to the date of full payment;
(iv) that there shall be costs on party to party basis to the plaintiff; and
(v) that there shall be liberty to apply.

LIN LIN SHIPPING SDN. BHD.

v.

GOVINDASAMY MAHALINGAM

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CIVIL APPEAL NO. KG. 21 OF 1992 (III)]
5 MAY 1993

SHIPPING LAW: Carriage of goods by sea - Goods short landed - Bill of lading - Whether covers deterioration of perishable goods or disappearance - Contra preferentum.

INSURANCE LAW: Doctrine of subrogation - Whether insurance company had to plead subrogation - Recovery of damages by insurer.

The respondent imported 326 packages and bags of spices products from Singapore amongst which were 100 bags of dates. The respondent utilised the appellants' vessel called "Lin Petaling III" (said vessel) to bring the imported products to Kuching. The terms of the relationship between the respondent and the appellant were contained in the bill of lading issued by the appellant on 18 March 1989. On 28 March 1989 the respondent went to clear the imported products from the Kuching Port Authority and discovered the goods were short landed. The respondent was indemnified by the insurance company for the loss of the goods in the sum of RM1,354. The Insurance Company claimed against the appellant under the doctrine of subrogation.

Held:

[1] The learned Magistrate believed the evidence of the respondent and the letters from the Kuching Port Authority and found that the appellant failed to prove its defence. As an appellate Court such finding of the learned trial Magistrate should not be substituted without valid reason.

[2] The tally sheet which would have cleared any doubt as to whether or not the goods were landed by the said vessel, were not tendered as an exhibit by the appellant at the trial. Such a conduct therefore would surely attract the effect of s. 114(g) of the Evidence Act 1950.

[3] Non-notification or late notification under the law is not fatal. The three days